IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.5498 OF 1997

Shri Jayshingrao Abasahed Mane, .. Petitioner.

Vs

Shri Ashok Yashwantrao Jadhav, .. Respondent.

Mr. M.R. Suryawanshi, for the petitioner.

Respondent, though served, absent.

CORAM : D.B.BHOSALE,J.

DATE : 30th August, 2005.

PC:

1. Heard learned counsel for the petitioner.

2. This petition is directed against the order dated 16.8.1997 passed by the learned Addl.District Judge, Gadhinglaj, below Exhibit 33 in Regular Civil Appeal No.133 of 1996, by which the application filed by the petitioner-plaintiff for amendment, has been rejected. By application Exhibit-33, the petitioner sought to correct the boundaries of the suit property. It appears

from the plaint that reference to the property was already made in the plaint. Though the exact boundaries were not given, area of the plot as mentioned in the agreement dated 2.9.1983 was also mentioned in the plaint. Mr Suryawanshi, learned counsel for the petitioner, submitted that the exact boundaries could not be given in the agreement since the lay out plan was not sanctioned at that stage. The lay out plan was sanction in 1985 whereas the agreement was executed on 2.9.1983. He further submitted that the identification of the plot in dispute, in any case, cannot be disputed in view of the fact that plot no.2 only has now remained with the respondent. Mr Suryawanshi next submitted that the petitioner shall not apply for recording additional evidence, in the event his application for amendment is allowed, by seeking remand of the suit to the trial Court. It is clear from the facts, as disclosed from the material placed on record, that the respondent-defendant had divided his land into five plots, and except plot no.2, he has sold the remaining four plots and the purchasers thereof are also put in possession long back. Admittedly, the agreement dated 2.9.1983 was executed between the parties. It is now well settled that the amendment can be allowed even at the appeal stage as long as it does not alter or

substitute new cause of action or changes very nature of the suit. What more is required to be taken care of, while allowing the application for amendment, is whether the proposed amendment causes any prejudice to other side which cannot be compensated by cost. Keeping that in view and considering that the extent of the plot has already been mentioned in the plaint and that out of the five plots only one plot has remained with the respondent, which the petitioner-plaintiff claims that it has been sold to him, in my opinion, no prejudice whatsoever would be caused to the respondent if the petitioner is allowed to amend the plaint as prayed for in the application Exhibit-33. It would be open for the respondent- defendant to amend his written statement and if necessary pray for recording additional evidence. In my opinion, the proposed amendment would not amount to or result in defeating the legal right accrued to the respondent-defendant on account of lapse of time. The delay in filing the application can be compensated by cost. In the facts of the present case the finding recorded by the learned Judge that the amendment would change nature of the suit cannot be sustained and must be set aside. In this view of the matter and in the interest of justice the impugned order is quashed and set aside and the application Exhibit-33 is allowed on

payment of cost of Rs.500/- to the respondent- defendant before carrying out the amendment. The petitioner to carry out amendment within 12 weeks from today. The appellate court shall endeavour to dispose of the appeal on merits in accordance with law as expeditiously as possible and preferably within one year from the date of receipt of this order. The statement of Mr Suryawanshi, that the petitioner shall not seek permission for recording additional evidence and remand of the suit for that purpose is accepted. Needless to mention that if the respondent-defendant files an application for recording additional evidence, same may be considered on merits in accordance with law.

(**D.B.BHOSALE, J.**)